

and it is perhaps unnecessary to observe that there can be no title to land in the Malay States independent of registration. That preamble on the face of it must be taken to govern all that follows, and I am fortified in thinking that it should govern all that follows by the consideration that the substantive provisions of the Ordinance deal entirely with registered dealings in land. It is in the light of these provisions and as a provision ancillary to them that section 33 must be read. That section commences with the statement that the Limitation Enactment shall apply to any proceedings relating to the validity of any dealing in land maintainable by virtue of the provisions of this Ordinance and proceeds to lay down that the period of limitation in regard to such proceeding shall be two years. Again there is no derogation from the general provisions of Limitation Enactment and it seems clear beyond doubt that the period of limitation of two years mentioned in the section can only apply in the case of proceedings which are maintainable by virtue of the Ordinance. The present proceeding is not a proceeding that is maintainable by virtue of the Ordinance. It is a proceeding that is maintainable by the ordinary law of contract. And therefore I must hold that section 33 has no application whatsoever.

That brings me to the question of hardship as affecting the exercise of its discretion by the Court. I will preface what I have to say by reading the statutory "Explanation" annexed to section 11 of the Specific Relief Ordinance. That reads:—

Specific performance ordered.

"Unless and until the contrary is proved the Court may presume that the breach of a contract to transfer immovable property cannot be adequately relieved by compensation in money....."

Bearing that in mind, I now pass to section 21, the relevant portion of which reads:—

"The following are cases in which the Court may properly exercise a discretion not to decree specific performance.

.....
"II. Where the performance of a contract would involve some hardship to the defendant which he did not foresee, whereas its non-performance would involve no such hardship on the plaintiff."

It may well be that the performance of this contract would involve some hardship on the estate of the vendor which the vendor did not foresee. I am not for one moment prepared to quarrel with that. But I am not prepared to say that on the other hand non-performance would involve no such hardship on the purchaser. It may well be there are hardships on both sides. If the vendor's estate are held to his bargain, there will be hardship in the sense that as a result of circumstances beyond anyone's control the bargain has turned out worse than was anticipated.

On the other hand, if it is not performed it seems to me that it will be at least a commensurate hardship on the plaintiffs to be deprived of the fruits of their bargain which may have turned out better than they had anticipated.

I am not prepared to attach any great importance to the expenditure that the defendant has incurred in litigating this and other related matters. In so far as that expenditure was increased by the ill-advised action of the present plaintiffs in the previous proceedings they have had to pay the usual penalty in the way of costs. So far as the balance is concerned, some of it, at any rate, can be attributed to the defendant's strenuous but unjustified resistance to the claim of the Mercantile Bank and the balance seems to me no greater than any unsuccessful litigant may expect to have to bear.

Bearing in mind the "Explanation" to section 11 of the Specific Relief Ordinance and bearing in mind the provisions of section 21 to the same Ordinance, I have no hesitation in exercising my discretion in the way of ordering specific performance.

There will be a declaration in the terms prayed and there will be an order for execution of transfer and delivery of documents in 21 days and the plaintiffs will have their taxed costs.

So much for the claim.

As regards the counter-claim, I think I need only say that from what I have said it follows that it should be dismissed with costs.

Claim allowed.

Re Estate of HO KEE CHEOW, a Bankrupt.

[O. C. J. (Thomson, J.) October 5, 1953]

[Ipoh — Originating Summons No. 167 of 1953]

Procedure — Bankruptcy — Application for declaration of lien and order for sale.

In 1951 Ho Kee Cheow executed a promissory note for \$5,900 in favour of the applicant. At the same time, by way of collateral security, Ho deposited with the applicant the document of title in respect of a certain mining lease, and the same day the applicant lodged a caveat in respect of this mining lease and thereby constituted in his favour a valid lien in accordance with section 35A of the Mining Enactment. The money due on the promissory note was not paid and in May 1952 the applicant brought a civil suit (No. 122 of 1952) against Ho in which he asked for judgment for the amount due under the promissory note but did not ask for a declaration and ancillary relief in respect of the lien. Subsequently judgment was entered in favour of the applicant in that suit for the amount prayed and costs and Ho was adjudicated a bankrupt on the petition of another creditor and a receiving order was made in respect of his estate.

The applicant took steps to have attached in execution the same mining lease as formed the subject

of his lien, and in January 1953, on his application the Official Assignee was substituted for Ho as defendant. No further proceedings were taken by the applicant in Civil Suit No. 122 of 1952, but in September 1953, he issued the present Originating Summons in which he asked for a declaration of his lien in respect of the mining lease and for an order of sale. No person was joined as respondent to the summons but a copy of it was served upon the Official Assignee.

The Official Assignee took preliminary objection on two grounds: (i) that the applicant had adopted the wrong procedure in proceeding by way of originating summons and that he should have proceeded by way of suit; (ii) that, in any event, the application was not admissible by reason of section 29 of the Civil Procedure Code.

Held: (1) it was beside the point that the present case was made by way of originating summons though it should have been made by way of suit but that was a mere technicality; (2) the applicant should have claimed the relief he now claims in Civil Suit No. 122 of 1952.

Cases referred to:—

- (1) *Alagappa Chetti v. Perianayagam* (1908) Innes 117.
- (2) *Payana Reena Saminathan & Anor v. Pana Lana Palaniappa* (1913) 41 I.A. 142 at 148.

APPLICATION for a declaration of lien over a mining lease and an order for sale.

W. J. Huntsman for the applicant.

R. Govindasamy for the Official Assignee.

Cur. Adv. Vult.

Thomson, J. : — This is an application for declaration of lien over a mining lease and an order for sale. The facts of the matter which are not in any way in dispute are as follows:—

On 28th August, 1951, one Ho Kee Cheow executed a promissory note for \$5,900 in favour of the present applicant, Foo Khoon Lim. At the same time, by way of collateral security, Ho deposited with the applicant the document of title in respect of a certain mining lease, and the same day the applicant lodged a caveat in respect of this mining lease and thereby constituted in his favour a valid lien in accordance with section 35A of the Mining Enactment.

The money due on the promissory note was not paid and, on 22nd May, 1952, the applicant brought a civil suit (No. 122 of 1952) against Ho in which he asked for judgment for the amount due under the promissory note but did not ask for a declaration and ancillary relief in respect of the lien.

On 12th July, 1952, judgment was entered in favour of the applicant in that suit for the amount prayed and costs and on 18th August, 1952, Ho was adjudicated bankrupt on the petition of another creditor and a receiving order was made in respect of his estate.

On 22nd October, 1952, the applicant took steps to have attached in execution the same mining lease as

formed the subject of his lien, and on 12th January, 1953, on his application the Official Assignee was substituted for Ho as defendant.

No further proceedings were taken by the applicant in Civil Suit No. 122 of 1952, but on 15th September, 1953, he issued the Originating Summons with which I am here concerned. No person was joined as respondent to that summons but a copy of it was served upon the Official Assignee. In it the applicant asked for a declaration of his lien in respect of the mining lease and for an order of sale.

On the matter coming on for hearing the Official Assignee has appeared and taken preliminary objection on two grounds. The first was that the applicant had adopted the wrong procedure in proceeding by way of originating summons and that he should have proceeded by way of suit.

The second was that, in any event, the application was not admissible by reason of section 29 of the Civil Procedure Code and, particularly, by reason of subsections (iii) and (iv) of that section which read as follows:—

“(iii) A person entitled to more than one relief in respect of the same cause of action may sue for all or any of such reliefs; but, if he omits (except with the leave of the Court) to sue for all of such reliefs, he shall not afterwards sue for any relief so omitted.

“(iv) For the purposes of this section an obligation and a collateral security for its performance and successive claims arising under the same obligation shall be deemed respectively to constitute but one cause of action.”

I do not find it necessary to deal with the first of these grounds but with regard to the second it was argued by Mr. Huntsman, for the applicant, that the effect of section 35A of the Mining Enactment was to enable the applicant to sue separately for declaration of his lien. In particular, he relied on the words “when the holder of such lien has obtained a judgment of Court for the actual sum due he shall be entitled to apply for and obtain forthwith an order for the sale of the mining land.”

If the matter were at large, Mr. Huntsman's argument would call for careful consideration.

It is not, however, at large.

The material portion of section 35A of the Mining Enactment is the same as the material portion of section 134 of the Land Code which in its turn follows the wording of section 78 of the Selangor Registration of Titles Regulation, 1891, and the effect of section 29 (then section 33) of the Civil Procedure Code upon that section was considered in the case of *Alagappa Chetti v. Perianayagam*⁽¹⁾. In that case the Court was concerned with facts very similar to those in the present case. There had been a loan followed by a promissory

note and the deposit of titles by way of collateral security. The plaintiff sued the defendant upon the promissory note for the unpaid balance of the loan only and this suit was dismissed by reason of limitation. The plaintiff then brought a second suit for an order under section 78 of the Registration of Titles Regulation "enabling me to enforce payment of the sum charged upon immovable property."

In dismissing the suit Innes, J.C., said:—

"Plaintiff is precluded from bringing this suit by the terms of section 33 (now section 29) of the Civil Procedure Code. The case *Gumani v. Ram Paderath Lal*, I.L.R. 2 All. p. 838, cited by Mr. Day in argument confirms this, if, indeed, any confirmation is needed in view of the very clear wording of sub-section (iv) of section 33 of the Code as to the disability of a plaintiff to sue first on a personal obligation and then on collateral security for the same sum."

That case was decided in 1908 and in amplification of what is said there I would quote the following passage from the judgment of Lord Moulton in the later Privy Council case of *Payana Reena Saminathan & Anor. v. Pana Lana Palaniappa*⁽²⁾ regarding section 34 of the Ceylon Civil Procedure Code which is the same as our section 29:—

"It is directed to securing the exhaustion of the relief in respect of a cause of action, and not to the inclusion in one and the same action of different causes of action, even though they arise from the same transactions. The first part of the clause makes it incumbent on the plaintiff to include the whole of his claim in his action. The second portion makes it incumbent on him to ask for the whole of his remedies. The final paragraph, in their Lordships' opinion, is not intended to be an illustration of the foregoing provisions, but a substantive enactment, making an obligation and a collateral security for its performance (which would otherwise be two independent causes of action) one cause of action for the purposes of the section."

In view of the authorities, I have no option but to dismiss the application. It is beside the point that it is made by way of originating summons. I agree that it should have been made by way of suit but that is a mere technicality. Whether it be made by originating summons or by way of suit, I am satisfied that it should be dismissed on the ground that the applicant should have claimed the relief he now claims in Civil Suit No. 122 of 1952.

Application dismissed.

TAN BOK KEE v. REGINA.

[A. Cr. J. (Brown, Ag. C.J.) October 21, 1953]

[Singapore — Magistrate's Appeal No. 142 of 1953]

Road Traffic—Motor Vehicles (Construction & Use) Rules, 1948, r. 95—Testing and accuracy of weighing machine.

It is essential that weighbridges of weighing machines which are to be used for the purpose of testing laden weight of heavy motor cars should be regularly

tested, and there must be some evidence from which their accuracy can be either proved or presumed.

When persons are charged with offences relating to overweight or underweight there must be some evidence to prove that the machine, which records the weight alleged by the prosecution, is accurate, or some evidence from which its accuracy can be presumed.

Case referred to:—

(1) *Sim Ah Man v. Public Prosecutor* (1949)
M.L.J. 21.

MAGISTRATE'S APPEAL.

P. F. de Souza for the appellant.

G. S. Hill (Crown Counsel) for the respondent.

The facts and arguments appear sufficiently from the judgment.

Cur. Adv. Vult.

Brown, Ag. C.J.: — The appellant was convicted of contravening Rule 95 of the Motor Vehicles (Construction & Use) Rules, 1948, by conveying bags of flour in a motor lorry when the weight transmitted by the rear wheels in line transversely was 7 tons 2 cwts. and 1 quarter, such weight being in excess of 6 tons which the maximum weight permitted by that Rule.

The case for the prosecution rested upon the evidence of an acting Sergeant of the Traffic Police who, suspecting the lorry to be carrying excess weight, told the appellant to take it to a weighbridge belonging to the City Council. There he first weighed the lorry with all four wheels on the weighbridge, and found the weight to be within the permitted weight for four wheels. Then he weighed it with the two rear wheels on the weighbridge and found the weight to be one ton 2 cwts. and 1 quarter in excess of the weight permitted for two wheels. No certificate of weight was given by the clerk in charge of the weighbridge either to the witness or to the appellant. I fully accept the observations which the learned Magistrate made about this witness in his Grounds of Decision, from which it follows that I accept the fact that the weight which was registered by the dial when the two rear wheels were on the weighbridge was the weight which was deposited to by the witness and which was stated in the charge. According to the machine, the weight on the two rear wheels exceeded the permitted weight.

But there was no evidence that the witness was a "police officer authorized in writing" to require the appellant to allow his lorry to be weighed, as required by sub-section (1) of section 39 of the Road Traffic Ordinance, 1941. And the provisions of sub-section (3) of that section (which requires a certificate of weight to be given to the appellant) were not complied with.